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Case No. 86-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

JUDY F. STICKLEN, JAMES L. DEGER AND FREDERICK H. CRANFORD,
Petitioners,

v.

CITY OF MIDDLETOWN, OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. Whether a municipality has standing under Ohio's bond validation laws to litigate the constitutionality of an initiative ordinance which purports to repeal any and all of the municipality's prior ordinances and contractual commitments pertaining to a public improvement project.

II. Whether an initiative ordinance which purports to repeal any and all prior ordinances and contractual commitments pertaining to a public improvement project unconstitutionally impairs the contractual rights and obligations of a municipality with respect to such project, especially where construction thereon has already commenced.

OTHER PARTIES BELOW

In addition to the parties identified in the Petition, Mary Rice was a Defendant-Appellant in the underlying proceedings before the Supreme Court of Ohio. Ms. Rice has apparently chosen not to join in the Petition herein.

Pursuant to Ohio Revised Code (O.R.C.) Section 133.71, Thomas E. Ferguson, the Auditor of the State of Ohio, and J. A. Tilton, the Auditor of Butler County, Ohio, were named as Defendants in the original Complaint, and both have been included as nominal parties in each stage of the appellate proceedings herein. Neither has appeared or otherwise taken any part in the proceedings below.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This action involves the constitutional provisions and statutes listed below. Pursuant to Supreme Court Rule 34.1(f), the full text of each appears in the Appendix.

United States Constitution, Article I, Section 10
Ohio Constitution, Article II, Section 28
Ohio Constitution, Article IV, Section 4(B)
Ohio Revised Code (O.R.C.) Section 133.71
Initiative Ordinance dated November 3, 1981, City of Middletown, Ohio

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STATEMENT OF THE CASE

Petitioners' extremely abbreviated Statement of the Case falls well short of providing this Court with a complete picture of the facts and procedural history of this dispute. While Petitioners chronicle their efforts to avoid being assessed for street improvements, they neglect to detail the thoughtful and deliberate manner in which Respondent City of Middletown, Ohio ("the City") planned, publicly debated, and finally carried out the project at issue here. Likewise, they attempt to gloss over the desperate, last-minute nature of their own attempts to block the project. Because both factors are extreme-

ly important to a full appreciation of the issues, Respondent hereby submits its own Statement of the Case.

A. Facts

This litigation originated in 1983 as a special bond validation proceeding under Ohio's Validation of Securities Act, O.R.C. §§ 133.71 through 133.80. It was commenced by the City for the purpose of validating its authority to issue bonds to pay most of its share of a municipal development project to widen and improve Manchester Road along its course within the City limits (the "Project"). The bonds were to be retired through special assessments levied against benefited property which abutted or adjoined the Project along Manchester Road. The filing of this suit by the City represented a final step in the Project, which had, by that time, already taken almost 20 years to plan, finance and build.

The Project was first considered as early as 1963. In that year, the City generated a master plan for municipal development which provided, in part, that Manchester Road should be upgraded from a two-lane rural roadway to a four-lane divided highway. On July 10, 1975, the Ohio-Kentucky-Indiana Regional Counsel of Governments ("OKI"), a regional planning organization responsible for distributing federal highway improvement funds, resolved that federal funds would be allocated for the Project. In anticipation of the availability of such funds, the City undertook title searches, appraisals, negotiations and acquisitions regarding the properties to be affected by the Project. Such activity cost the City approximately $68,000 and took place over a period of roughly three years.

On May 10, 1977, the City Commission passed Resolution No. R77-19 which was the first of many subsequent pieces of enabling legislation regarding the Project. It officially instructed the City Administration to proceed with the Project. Following this directive, the City prepared a detailed plan for the Project and, on March 3, 1978, presented it to the Ohio

Department of Transportation ("ODOT") for approval. ODOT is a state agency which acted as the approving and contracting authority insofar as the construction work was concerned, and as a conduit for federal funding. Following some subsequent negotiations, ODOT approved the Project.

On the strength of such acceptance, the City Commission adopted Ordinance No. 78-93 on May 2, 1978, formally approving the Project and directing the City Administrator to enter into appropriate contracts with ODOT for its completion. This Ordinance actually set out the basic contractual obligations to be undertaken by the City and ODOT, respectively; a certified copy was signed by the City on May 12, 1978, and by ODOT on June 2, 1978. Both entities specifically acknowledged therein that the Ordinance was "accepted as a basis for proceeding with the improvement."

Pursuant to Ordinance No. 78-93, the City agreed to assume the full cost of the Project, less the amount of federal funds available, and to assume the full expense associated with right-of-way acquisition and certain preliminary engineering costs. Moreover, the City agreed to maintain and operate the Project following its completion. The full text of this measure was published in the *Middletown Journal* on May 12, 1978. No objections or attempts to halt the Project were instituted at that time by Petitioners or anyone else.

The preliminary estimated cost of the construction on the Project was $1,185,000. Under the federal funding requirements then in effect, it was anticipated that federal money would cover 70% of the construction costs, and that the City would be responsible for the remainder. From the outset, the City planned to finance the major portion of its share of the Project by special assessments levied on benefited owners of the property bounding upon the improved section of Manchester Road. Funds generated in this manner were to be used to retire bonds which the City would issue to pay for its portion of the construction and related expenses. Approximately 81 pieces of private property along Manchester Road were affected.

In early 1979, the City Commission enacted Ordinance No. 79-19, authorizing public hearings on the Project. Written notices were sent to all landowners along the affected portion of Manchester Road, and two hearings were held on May 8, 1979. Twenty-seven of the affected landowners were present during at least one of the two May 8 sessions, including all of the Petitioners. Twenty-four other interested persons also attended one or another of the sessions. Much discussion took place there. Many of the details of the Project were communicated to those attending, and all were advised that they would be subject to special assessments. The affected landowners were even told approximately how much the assessments would be. A summary report of the questions and concerns raised at the meetings was mailed to Manchester Road landowners in October, 1979.

On January 20, 1981, the City Commission adopted Resolution No. R81-3, which recognized the necessity of improving Manchester Road and declared that special assessments should be levied against abutting property. The resolution stated further that the proposed improvement was conducive to the public health, convenience and welfare of the City and its inhabitants.

After enactment of Resolution No. R81-3, all affected property owners were notified and given the opportunity to object to the assessments. Five objections were received and were thereafter resolved by an Assessment Equalization Board appointed for that purpose. In March, 1981, the City Commission adopted Resolution No. R81-12, specifically approving the decisions of the Assessment Equalization Board. It also passed Ordinance No. 81-44, which declared the City's intention to proceed with and complete the Project and to levy the proposed special assessments. On April 7, 1981, the City commission enacted Ordinance No. 81-49, slightly revising Ordinance No. 78-93 to effect some cost-saving measures.

On June 23, 1981, the City Commission enacted Resolution No. 81-41 approving final plans and arrangements for the Project, including the appropriation of $332,355, which

represented the City's share of the Project. This sum was then paid to ODOT. A formal contract between the City and ODOT was executed concurrently with the passage of Resolution 81-41. With respect to the City's maintenance and operating obligations following the completion of the construction phase of the Project, the contract incorporated exactly the same language set forth in Ordinance No. 78-93.

Bids for the construction phase of the Project were let on June 19 and July 6, 1981 by ODOT. On July 21, 1981, ODOT opened the bid offers received and thereafter, on July 27, 1981, awarded the contract to SK Construction Company. Construction commenced in due course. As of November 9, 1981, 59.6% of this phase of the Project was completed. By July 1, 1982, construction was 100% complete.

Two weeks prior to the passage of Resolution 81-41, and more than four years after the passage of the initial resolution relating to the Project, several of the landowners to be assessed for the Project filed with the City's finance director a verified copy of an ordinance which they intended to make the subject of an initiative petition. This was the first formal action taken by any person in an attempt to halt the Project. The language of the initiative petition called for a popular vote on the question of whether or not to repeal all of the previous legislation enacted by the City and all City "commitments" pertaining to the widening and improvement of Manchester Road.

The full text of the proposed ordinance (the "Initiated Ordinance") appears in Respondent's Appendix, *infra*. As is clear from its language, the intention of its proponents was to repeal "all" previous legislation and "commitments" relating to the Project, including ordinances and contracts covering the preliminary work, the actual construction of the improvements, and the continuing maintenance and operating obligations of the City.

On July 17, 1981, after the contract with ODOT had already been signed and ODOT had let bids for the construc-

tion phase of the Project, the initiative petitions were filed with the City, which forwarded them to the Butler County, Ohio Board of Elections. On July 24, the Board validated sufficient signatures to have the matter placed upon the November, 1981 ballot. On November 3, 1981, amidst public uncertainty over the language on the ballot,[1] the measure passed by a vote of 5,230 to 3,406.

Throughout 1981, construction on the Project proceeded. Neither the circulators of the petitions nor the property owners to be affected by the special assessments took any legal step to halt the construction or any other aspect of the Project. After the election, the City, in the firm belief that it was beyond the power of the electorate to impair its long-standing contract with ODOT, allowed construction to continue. The remaining 40% of construction on the Project was thus completed by July 1, 1982. During the time between the effective date of the Initiated Ordinance, November 9, 1981, and the completion of the Project, no attempt was made by Petitioners to enforce the Initiated Ordinance or otherwise stop the Project.

On June 7, 1983, in conformity with its previous ordinances and resolutions, the City Commission passed measures levying the special assessments on affected landowners and providing for the issuance of bonds to pay off the City's costs in anticipation of collecting such assessments. The bonds, however, could not be sold while the cloud created by the Initiated Ordinance hung over the Project and all commitments made in connection with it.

B. Procedural History

The City commenced this action pursuant to O.R.C. § 133.71 on July 12, 1983 in the Butler County, Ohio Court of Common Pleas. It sought approval of its authority to issue the bonds and confirmation of the validity of all its or-

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[1] In order to register their support for the Project, City electors had to vote "No"; to register opposition to the Project, they had to vote "Yes."

dinances, resolutions and contracts relating to the Project, including the ordinances levying special assessments. The City contended, *inter alia*, that the Initiated Ordinance unconstitutionally interfered with the contract between it and ODOT and was therefore void *ab initio*.

Petitioners were owners of property affected by the Project and immediately became name-defendants to the action by pleading to the Complaint as provided in O.R.C. § 133.77. They contended that the City had no standing to bring the suit, and that the contract with ODOT was no longer subject to impairment since it was completed before suit was filed. They also asserted that, in any event, the portion of the Initiated Ordinance which purported to repeal the assessments could and should be given full force and effect, irrespective of the status of the rest of it, because the assessments were not part of the contract in the first place. The City replied by pointing out that it had standing under a special statute, O.R.C. § 133.71; that the Initiated Ordinance unconstitutionally impaired the contract as of November 3, 1981, when it was enacted, and was not resurrected by the subsequent completion of the contract; and that it was legally impermissible to sever off and give separate effect to the small portion of the Initiated Ordinance which covered the assessments.

The case was tried to the court on August 16, 1983. Although a number of witnesses gave testimony, many of the key facts and exhibits were stipulated.

On March 1, 1984, the trial court held that the proposed bonds and special assessments were valid. It ruled that the case was justiciable because it was "brought under a specific statutory procedure [which] enlarges the standing of the City to bring up the impairment of contract issue." Petitioners' Appendix [Pet. App.] at 47a. The trial court found further that the Initiated Ordinance had never actually impaired any contractual obligation because the City chose to proceed with the Project in spite of the measure, but it rejected Petitioners' argument that the portion of the initiative repealing special

assessments could be given separate effect. It reasoned that since the purpose of the Initiated Ordinance had clearly been to halt the entire project, thereby accomplishing an unconstitutional result, ancillary parts of the measure which might otherwise be valid could not be severed from the whole and carried out. *Id.* at 60a.

The Court of Appeals for Butler County, Ohio affirmed the trial court's judgment on April 29, 1985. It agreed with the trial court that "R.C. 133.71 provides [the City] with specific statutory standing to contest the constitutionality of the initiative ordinance." *Id.*, at 33a. It disagreed, however, as to whether the Initiated Ordinance had impaired any contractual obligation. The Court of Appeals found that the measure, if enforced, would "not merely impair the city's contractual obligations but would thoroughly eliminate them." Pet. App. at 36a. It thus held that the Initiated Ordinance was unconstitutional on its face as of November 9, 1981, its effective date.

The Supreme Court of Ohio considered the matter on further appeal and took a similar approach in its opinion of July 23, 1986. Affirming the court of appeals, it quickly dispatched the justiciability question. It ruled that traditional principles of common law standing do not apply here because O.R.C. § 133.71 clearly contains a "special statutory grant of authority" to litigate "the validity of all proceedings taken in connection with the bonds [the City] proposes to issue." 25 Ohio St. 3d at 75; Pet. App. at 9a. The court also indicated that the case was otherwise justiciable:

> The bonds cannot be issued if, as [Petitioners] contend, the initiative ordinance repealed all necessary legislation relating to the levying and collection of assessments. Accordingly, the constitutionality of the initiative ordinance is vital to a determination of whether the city has authority to issue the bonds.

Id., at 8a.

On the impairment of contract question, the Ohio Supreme Court concurred with the court of appeals that the Initiated Ordinance unconstitutionally frustrated the contractual expectations of the City and ODOT regarding construction, but added that the City's interest in the assessment method of financing the Project was also at stake as a matter of contract:

> From the inception of this project, the city intended to recoup its share of the project costs by issuing bonds in anticipation of the collection of assessments. The city passed this assessment legislation in order that its general revenues would not be depleted. The city undertook its contractual obligations on the premise that a specific source of revenue would be available by law to fund them. Passage of the initiative ordinance then simply repealed the legislation necessary to levy the assessments without even proposing an alternative source of funds from which to replenish lost general revenues. The city thus could not issue bonds in anticipation of the collection of assessments and could not recover its costs from the very source of funds upon which it had relied when entering the contract with ODOT. Such a result entirely frustrated the city's reasonable expectations and thus substantially impaired the city's contract with ODOT.

25 Ohio St. 3d at 78; Pet. App. at 12a-13a. The court completed its constitutional analysis by ruling that since the Initiated Ordinance was not "reasonable and necessary to serve an important public purpose," its abrogation of the contractual relationship of the parties could not be permitted under the Contract Clause.[2] *Id.*, at 14a.

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[2] These were not the only post-construction proceedings by which Petitioners sought to prevent the proposed assessments. On May 30, 1984 — approximately two months after the trial court held the Initiated Ordinance to be unconstitutional — Petitioners filed an action under 42 U.S.C. § 1983 against the City and certain of its commissioners and officers. They claimed that their civil rights had been violated when the City Commission

SUMMARY OF ARGUMENT

Neither of the issues before this Court raises an important or unsettled question of federal constitutional law. The first issue — whether the City had proper standing to contest the constitutionality of the Initiated Ordinance — does not involve any federal question at all. Since this action was commenced as a special bond validation proceeding, standing *vel non* is purely a matter of state law. The lower courts all correctly held that special standing was conferred here by O.R.C. § 133.71. The case was otherwise justiciable under common law because the City could not safely issue its proposed bonds or levy its proposed assessments until the validity of the Initiated Ordinance was judicially determined. It thus had a very real stake in the outcome of the litigation.

The second issue — whether the Initiated Ordinance unconstitutionally impaired contractual obligations — is a federal question, but its resolution by the Supreme Court of Ohio was entirely consistent with well settled principles long established by this Court. Had the Initiated Ordinance been valid, it would have totally abrogated all obligations arising out of the contract between ODOT and the City and completely frustrated the City's reasonable expectations regarding the construction and proposed financing of the Project. As

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designated certain Project ordinances as "emergency" measures, thereby insulating them from attack by way of referendum (as opposed to initiative) under Ohio law. The United States District Court for the Southern District of Ohio, *per* Rubin, J., dismissed the action on the grounds that such "emergency" designations did not implicate any federal constitutional right. *Sticklen* v. *City of Middletown*, slip op., No. C1-84-0840 (S.D. Ohio, Sept. 6, 1984). The United States Court of Appeals for the Sixth Circuit affirmed *per curiam*, holding that the state court proceedings (which were then before the Supreme Court of Ohio) were *res judicata* on Petitioners' § 1983 claims. *Sticklen* v. *City of Middletown*, slip op., No. 84-3820 (6th Cir., Oct. 30, 1985). The District Court subsequently awarded attorney fees to the City under 42 U.S.C. § 1988. It based its award on the fact that Petitioners had continued to litigate the matter long after it had or should have become clear to them that their claims were completely devoid of merit. *Sticklen* v. *City of Middletown*, slip op., No. C1-84-0840 (S.D. Ohio, May 29, 1986).

such, the initiative would have worked a substantial impairment of contract. Moreover, since the initiative would have operated only for the benefit of a few abutting landowners rather than serving an important public purpose, it was void *ab initio*.

ARGUMENT

CERTIORARI SHOULD BE DENIED BECAUSE THIS CASE DOES NOT PRESENT A SUFFICIENTLY "SPECIAL AND IMPORTANT" QUESTION OF FEDERAL LAW, AND THE JUDGMENT BELOW RESTS ON WELL ESTABLISHED STATE AND FEDERAL PRINCIPLES.

Certiorari is an extraordinary writ, and by definition, its use is reserved for extraordinary circumstances. Under Supreme Court Rule 17.1, the writ will be granted "only when there are special and important reasons therefor." As this Court has made clear, the Rule implies "a reach to a problem beyond the academic or episodic." *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

This point is reinforced in the subsections of Rule 17.1, all of which set forth particular circumstances under which the writ may be granted. Of these, only subsection (c) is even remotely applicable here, for the rulings of the courts below are not (and are not claimed to be) in conflict with those of any other state or federal court. Subsection (c) provides that certiorari may be considered "[w]hen a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court." Importance, for purposes of the Rule, is measured not so much by the impact of the case on its particular litigants, but rather by the potential of a dispute to have an impact on the development of national law. 13 *Moore's Federal Practice* ¶ 817.41 (1985).

This case simply does not present such an "important question." Although its outcome is of vital concern to the parties, its resolution does not hinge on unsettled issues of state or federal law. Its facts, like those of any case, may arguably be unique, but in deciding it, the courts of Ohio correctly applied rules and principles long adhered to by this Court. It is not, therefore, one of those precious few cases on which this Court should focus its limited resources.

Petitioners attempt to portray this case as a classic struggle

between voters and their elected officials. In truth, it is much less than that. Indeed, as the Supreme Court of Ohio observed, "[h]ad the initiative been brought at an earlier time, before there was an executed contract, and before construction had begun, this controversy likely would not be before us today." 25 Ohio St. 3d at 74; Pet. App. at 6a-7a. From a practical point of view, then, the case represents little more than a belated effort by three Middletown landowners to avoid having to pay for their share of the Manchester Road improvements. Legally, it involves just two basic issues, only one of which has federal implications. As shall be shown in greater detail below, neither of these questions is substantial enough to warrant further review by this Court.

A. As A Matter Of Ohio Law, A Municipality Has Special Standing To Contest the Validity Of An Initiative Which Relates In Any Way To The Issuance Of Bonds For Public Improvements, Especially Where Such Initiative Purports To Repeal "Any And All" Ordinances And Contractual Commitments Relating To The Improvement.

1. Whether the City had standing at the time the bond validation proceedings were commenced is not a federal question.

The first issue presented by Petitioners is whether the City had proper standing in the state courts to challenge the constitutionality of the Initiated Ordinance. They assert that the Ohio Supreme Court's finding of justiciability is "erroneous." This, however is simply not a federal question. Each of the courts below ruled clearly and unequivocally that the City had special standing, under O.R.C. § 133.71, *et seq.*, to litigate the validity of the initiative. They also held, either expressly or implicitly, that the matter was otherwise justiciable under Article IV, Section 4 of the Ohio Constitution. In so ruling the Supreme Court of Ohio "borrowed" some of its analysis from this and other federal courts, but its holding is purely a creature of state law. It decided no federal question.

This Court must, of course, satisfy itself of its own Article III jurisdiction before it can proceed further, but Petitioners do not allege any Article III defect here. They argue instead that the City had no standing *at the time it first filed its bond validation action*. Since this matter originated in the state courts, Article III does not even come into play on the standing question; standing is a subject to be considered under Ohio law, not federal law. The question is therefore inappropriate for review on certiorari.

2. O.R.C. § 133.71 conferred special standing on the City to contest the validity of any "proceedings" taken in connection with the Project.

Even if this aspect of the case implicated a "federal question", it would not be "special" or "important" enough under Rule 17.1 to justify certiorari. O.R.C. § 133.71(B) clearly states that an issuer of municipal bonds, prior to selling such securities, may "file a petition for validation and thereby commence an action for the purpose of obtaining an adjudication of its authority to issue the securities *and the validity of the proceedings taken and proposed to be taken therewith*" (emphasis added). Here, as the Ohio Supreme Court recognized, a major aspect of the "proceedings" at issue was the enactment of ordinances authorizing special assessments against Petitioners:

> Surely the city's ordinances of June 7, 1983 levying the special assessments and providing for the issuance of bonds in anticipation of the collection of the assessments were essential proceedings taken in connection with these securities. It is the validity of these proceedings which the city seeks to adjudicate.

25 Ohio St. 3d at 75; Pet. App. at 8a. The validity of these ordinances depends squarely on the constitutionality of the Initiated Ordinance. If, and only if, the Initiated Ordinance is constitutionally defective, and thereby void *ab initio*, can the assessment ordinances be validated. The City thus had clear statutory authority to litigate this issue. *See Dayton* v. *Cloud*, 30 Ohio St. 2d 295, 59 Ohio Ops. 2d 370, 285 N.E. 2d 42 (1972).

Petitioners argue that regardless of O.R.C. § 133.71(B), the City must show some "personal stake" in the outcome of the litigation. There is, however, absolutely no support for this proposition in either state or federal law. Standing, as the Ohio Supreme Court observed, "does not flow from the com-

mon law 'personal stake' doctrine alone; . . . [i]t may also be conferred by a specific statutory grant of authority." 25 Ohio St. 3d at 75; Pet. App. at 8a.

In *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), this Court explained that:

> Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' *Baker* v. *Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L. Ed. 2d 663, as to ensure that 'the disputes sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' *Flast* v. *Cohen*, 392 U.S. 83, 101, 88 S. Ct. 1942, 1953, 20 L. Ed. 2d 947. Where, however, . . . [the legislative authority] has . . . provided by statute for judicial review . . ., the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.

405 U.S. at 731-732. The Supreme Court of Ohio expressly relied on this passage. 25 Ohio St. 3d at 75; Pet. App. at 8a. As a matter of both state and federal law, therefore, standing may be conferred by a statute which grants specific access to the courts.

Petitioners rely on *Warth* v. *Seldin*, 422 U.S. 490 (1975), for a contrary proposition. *Warth*, however, unlike *Sierra Club*, did not involve a specific statutory grant of authority to sue; rather, it involved standing asserted by virtue of federally created substantive rights. While standing thus created may require the additional showing of personal stake, standing which arises from a state law creating a special statutory proceeding does not. *Sierra Club*, *supra*; *see also Diamond* v. *Charles*, 106 S. Ct. 1697, 1705 n. 17.

3. The City had, and continues to have, an enormous "stake" in these proceedings.

If, contrary to the Ohio Supreme Court's reading of O.R.C. § 133.71, a "personal stake" requirement is held to exist under these circumstances, there still can be little question that the City has a very real interest in these proceedings. The Initiated Ordinance purports, on its face, to repeal three existing municipal ordinances, as well as "any and all further legislation . . . having reference to the widening and improvement of Manchester Road . . . ." From the time the initiative was passed, therefore, the City had an immediate and inherent interest in defending the validity of its pre-existing legislation, or at least in having the apparent conflict resolved. *Diamond* v. *Charles*, *supra*, 106 S. Ct. at 1703.

When the Initiated Ordinance purportedly became effective, construction was far from complete. Although the City had paid its share of the Project's cost, it had clearly not received the full benefit of its bargain from ODOT or the other contractors. It was thus faced with a Hobson's choice. On one hand, it could have treated the Initiated Ordinance as valid and halted construction, which at that point was only 59.6% complete. To do so would have left the City and its citizens, especially abutting landowners, with a muddy trench instead of a four-lane road, as well as an eyesore and serious safety hazard. It would also have raised very serious questions about the rights and obligations of ODOT with respect to the City, and vice-versa. At that point, for instance, ODOT might successfully have argued that it was under no contractual duty to return any of the City's construction funds, notwithstanding the fact that the Project was unfinished. The City obviously had a high degree of interest in seeing that this did not happen.

On the other hand, the City could, and did, allow the Project to be completed, thereby procuring for its citizens the benefits of a vastly improved Manchester Road. The City's decision to go forward did not diminish its interest in having the Initiated Ordinance declared unconstitutional, though. The Project was still very much in progress, and it was in the

best interests of both the City and its contractors to know that they could thereafter rely on the contractual and legislative commitments previously made.

Petitioners suggest that this interest was merely hypothetical, and that the City suffered no "distinct and palpable" injury to itself since the street improvements were later completed satisfactorily. This contention focuses too narrowly on the construction phase of the Project; it totally ignores the less conspicuous but equally important financial side of the transaction. While the Project was physically complete at the time the bond validation proceedings were filed, it was financially unfinished. No bonds had been issued, and no assessments had been collected. The initiative totally stymied this process. Unless the proposed securities were validated, the City's legal authority to retire them with proceeds from special assessments would forever be in doubt. This would, as a practical matter, have mired the bonds in a swamp of uncertainty, making their sale virtually impossible. *See Hamilton County* v. *Cloud*, 42 Ohio Ops. 2d 171, 172-173, 236 N.E. 2d 803 (Hamilton Cty. Cm. Pl. 1967); aff'd (Hamilton App. 1967), *appeal dismissed sub nom. Bazell* v. *Hamilton County*, 13 Ohio St. 2d 63, 42 Ohio Ops. 2d 137, N.E. 2d 864 (1968), *appeal dismissed and cert. denied*, 391 U.S. 601 (1968). *See also Love* v. *Yazoo City*, 162 Miss. 65, 138 So. 600 (1932).

Such a stalemate would inevitably have resulted in real harm, both to the City as an entity, and to its electors. If the bonds could not be sold, the Project, being largely complete, would have to be paid for out of the City's general fund. This would, in turn, have tied up funds earmarked for other uses, damaged the City's bond rating, and otherwise restricted its future power to borrow. *See State ex rel. Youngstown* v. *Jones*, 136 Ohio St. 130, 135-138; 16 Ohio Ops. 73, 24 N.E. 2d 442 (1939).

Perhaps more importantly, the failure of the financing plan would have effectively shifted the burden of the Project's costs from Petitioners and other benefited landowners directly to

all Middletown taxpayers. This, as the trial court found, was never the intent of the electorate:

> [I]t would appear that the drafters of the [Initiated Ordinance] and the electors intended to halt the project when they voted in favor of the ordinance on November 3, 1981. The voters have clearly failed to accomplish the thrust of the initiative ordinance. Having thus failed to accomplish the goal of the initiative ordinance, do we tell the electorate of Middletown that they have instead transferred the cost of the project from the abutting landowners of Manchester Road to the electors as a whole? We hardly think so. The electors did not vote on that issue, and they certainly cannot now be said to have intended such a result.

Pet. App. at 59a-60a.

Contrary to Petitioners' contention, then, the City, both in its capacity as a municipal corporation and in its capacity as a representative of its electors, stood to suffer a very "distinct and palpable" injury at the time the bond validation proceedings were filed. The real threat of not being able to complete the intended financing plan, and of suffering the consequences, vested the City with more than sufficient interest in the proceedings to give it proper standing under common law. It also assured both the Ohio courts and this Court of a sufficiently "live" case or controversy. In all respects, then, this action was and is fully justiciable.

B. Where An Initiative Ordinance Purports To Repeal "Any And All Commitments" Of A Municipality With Respect To A Public Improvement Project, But Is Passed Well After Performance Of The Contract For The Improvement Has Begun, It Is Unconstitutional And Void Ab Initio.

1. By its very terms, the Initiated Ordinance impaired each and every contractual obligation of the City with respect to the Project.

Article I, Section 10 of the United States Constitution provides that "No State shall . . . pass any . . . Law impairing the obligation of Contracts . . . ." As the Court has long recognized, this is among the most important of all constitutional restraints; the inviolability of contracts, and the duty of performing them as made, are foundations of all well ordered societies. *Murray* v. *Charleston*, 96 U.S. 432, 448 (1877). The fear that such foundations might be jeopardized was a primary motive for the framing of the Contract Clause. *Id.*

A statute or ordinance impairs the obligations of contract when, by its terms, it nullifies or materially changes existing contractual obligations. *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978); *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983). For purposes of constitutional analysis, it matters not whether such statute or ordinance is passed by a legislative body or directly by the voters. *Ross* v. *Oregon*, 227 U.S. 150, 163 (1913); *see also Continental Illinois Nat'l. Bank & Trust Co.* v. *Washington*, 696 F.2d 692 (9th Cir.), *appeal dismissed sub nom. The Don't Bankrupt Washington Committee* v. *Continental Illinois Bank & Trust Co.*, 460 U.S. 1077 (1983). It matters only that the legislation interferes with reasonable contractual expectations. *See Energy Reserves Group, supra; Minnesota Assoc. of Health Care Facilities* v. *Minnesota Dept. of Public Welfare*, 742 F.2d 442 (8th Cir 1984).[3]

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[3] A similar standard applies under Article II, Section 28 of the Ohio Constitution, which provides that "[t]he general assembly shall have no power

Here there can be little doubt that such disruption of contractual relations was precisely the intended effect of the initiative. By its very terms, the Initiated Ordinance purported to repeal "any and all commitments of the City of Middletown, Ohio to widen and improve Manchester Road . . . ." It is undisputed, moreover, that the drafters of the Initiated Ordinance wanted to stop the Project immediately; they fully intended to cancel all of the City's outstanding contractual obligations with respect to the Project, regardless of whether some or all had already been performed. *See* Pet. App. at 56a-60a. Under the circumstances, it is beyond question that the Initiated Ordinance was unconstitutional as enacted, and the Ohio Supreme Court so found. Furthermore, it cannot seriously be argued that the passage of time and the occurrence of subsequent events, like the completion of the Project's construction phase, somehow revived the Initiated Ordinance. It was void as of November 9, 1981, and it remained so thereafter for all purposes.

Notwithstanding the clear language and effect of the Initiated Ordinance, Petitioners contend that this legislation amounted only to a breach or repudiation of the City's contractual obligations and does not, therefore, implicate any impairment issue. In support, they rely on a quartet of this Court's decisions handed down between 1901 and 1920. Even assuming *arguendo* that these cases still reflect modern think-

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to pass . . . laws impairing the obligations of contracts. . . ." Ohio courts have indicated that this prohibition is similar to that contained in the federal Constitution, and they have applied it consistently with this Court's decisions in Contract Clause cases. *See Goodale* v. *Fennell*, 27 Ohio St. 426 (1875); *State ex rel. City of Youngstown* v. *Jones*, 136 Ohio St. 130, 16 Ohio Ops. 73, 24 N.E. 2d 442 (1939); *Haught* v. *Dayton*, 32 Ohio App. 2d 133, 288 N.E.2d 846 (Montgomery Cty. 1972), *rev'd on other grounds*, 34 Ohio St. 2d 32, 295 N.E. 2d 404 (1973). Although the Supreme Court of Ohio did not rely on Section 28 in deciding this case, it plainly could have. *Id.* There are thus independent and adequate state grounds for the result reached here. *Herb* v. *Pitcairn*, 324 U.S. 117 (1945); *Fay* v. *Noia*, 372 U.S. 391 (1963); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *see also Stembridge* v. *Georgia*, 343 U.S. 541 (1952); and *Paschall* v. *Christie-Stewart, Inc.*, 414 U.S. 100 (1973).

ing on the Contract Clause, *cf. Allied Structural Steel*, *supra* and *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), they provide no support whatsoever for Petitioners' argument.

Three of these cases do not even involve a true "impairment" question. Each lacked the *legislative* abrogation of a *contractual* right, as comprehended by the Contract Clause. In *McCormick* v. *Oklahoma City*, 236 U.S. 657 (1915), the Court "observed" that there was no actual contract to be impaired. In *City of Dawson* v. *Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Co.*, 197 U.S. 178 (1905), the Court found a contract to exist, but it went on to state "there was no legislation subsequent to the contract" which could even arguably have impaired it. 197 U.S. at 182. In *St. Paul Gaslight Co.* v. *City of St. Paul*, 181 U.S. 142 (1901), the Court assumed the existence of a contract but held that no "legislative act . . . [existed] from the enforcement of which an impairment of the obligations of the contract . . . did or could result." 181 U.S. at 151.

The fourth case cited by Petitioners, *Hays* v. *Port of Seattle*, 251 U.S. 233 (1920), arguably involved both an existing (though suspended) contract and a subsequent legislative action which indirectly affected it. There, however, the alleged impairment did not change important contractual rights. The Court prefaced its ruling by noting that "[h]ad the Legislature of Washington, pending performance or after complete performance by complainant, passed an act to alter materially the scope of his contract, to diminish his compensation, or to defeat his lien upon the filled lands, there would no doubt have been an attempted impairment of the obligation." 251 U.S. at 237. It then held that no impairment took place because the contested legislation fully preserved the complainant's right to recover his damages for any alleged breach of contract by the state. *Id.*

This alone makes *Hays* distinguishable. In this case the Supreme Court of Ohio specifically found, as a matter of state

law, that the effect of the Initiated Ordinance would have been to preclude "any remedy in damages." 25 Ohio St. 3d at 130; Pet. App. at 11a. If the Initiated Ordinance was enforceable, then the contract between the City and ODOT was not, and neither party would have had a claim for contract damages against the other. Even the *Hays* Court suggested that this would be an intolerable situation under the Contract Clause. It cannot fairly be said, therefore, that the Initiated Ordinance acted as a mere breach or repudiation of the City's contractual obligations. It was clearly a legislative attempt to abrogate existing and significant contractual obligations.

2. The impairment caused by the initiative was "substantial" for purposes of the Contract Clause.

Where challenged legislation necessarily impairs existing contractual obligations, the impairment must be "substantial" to warrant a high level of judicial scrutiny. *Allied Structural Steel*, *supra*, 438 U.S. at 234. "If impairment is severe the level of scrutiny of the law will be greater, as a substantial impairment of the obligations of a contract is more likely to offend the Contract Clause." 25 Ohio St. 3d at 77. This is especially true where the majority, either directly or through its legislature, attempts to impair a public contract. *See U.S. Trust*, *supra*, 431 U.S. at 22-23.

As discussed *supra*, the Initiated Ordinance plainly worked an impairment. It is equally clear that such impairment was constitutionally substantial. At the time the initiative was passed, the Project was still far from completion. Had the Initiated Ordinance been enforced, the parties' contractual rights and obligations would have been destroyed, and the Project would, of necessity, have been halted. The resulting impairment would have been not only significant, but total. Indeed, "[i]t is difficult to imagine a more substantial impairment." 25 Ohio St. 3d at 78; Pet. App. at 13a.

Petitioners maintain that since the Project was never actually stopped, this potential effect of the Initiated Ordinance should be overlooked. The fact that the City chose to continue construction in spite of the initiative, however, does not somehow make the measure any more acceptable under the Contract Clause. Because it purported to repeal all contractual commitments of the City as of November 9, 1981, it was void in its entirety on that day. *Norton* v. *Shelby County*, 118 U.S. 425 (1886); *see also Ex Parte Siebold*, 100 U.S. 371 (1879); and *Chicago I. & L. Ry. Co.* v. *Hackett*, 228 U.S. 599 (1913).

In addition, the Initiated Ordinance cancelled a number of contractual obligations which survived the construction phase

of the Project. The City, for example, was contractually obliged to maintain and operate the Project after it was completed. The initiative purported to eliminate this duty.

The Initiated Ordinance also did substantial violence to the parties' reasonable expectations regarding the financing phase of the Project. The proposed bonds and special assessments were an essential part of the Project; they had been envisioned both by ODOT and the City since its inception. The preliminary ordinances recognizing and approving these financial arrangements were incorporated by reference into the ODOT contract. They thus became contractual, as well as statutory, obligations. *Home Building & Loan Assn.* v. *Blaisdell*, 290 U.S. 398 (1934); *U.S. Trust Co.*, *supra*, 431 U.S. at 20. When the Initiated Ordinance purported to cancel both the contract provisions and the prior ordinances dealing with the financing plan, the expectations of ODOT, the City, and the public were frustrated. This frustration, in and of itself, amounted to a substantial impairment. *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983).

3. The initiative was neither reasonable nor necessary to serve any important public purpose.

Having determined that the impairment was severe, the Court must, under *Allied Structural Steel*, turn to the question of justification. Because of the high level of scrutiny required, the Initiated Ordinance can pass constitutional muster only if it is both "reasonable and necessary to serve an important public purpose." *United States Trust Co.*, *supra*, at 25. Here it is neither. The only justification ever articulated for the Initiated Ordinance was, astoundingly, that it would facilitate traffic safety. As the Supreme Court of Ohio noted rather tongue in cheek, however, the initiative represents a "most drastic means of addressing [whatever] safety problems" are inherent in the Project. 25 Ohio St. 3d at 79; Pet. App. at 15a. It is hardly necessary, or even reasonable, to address safety concerns by attempting to abolish the Project, which itself was conceived as a means of easing traffic flow and improving overall safety. Indeed, given that the Initiated Ordinance would have left the citizens of Middletown with an unfinished ditch where Manchester Road once had been, it seems likely that public safety would have been directly damaged, rather than improved, by its enforcement.

The traffic safety justification is thus little more than a fiction. Once the construction phase of the Project was finished, the only true purpose in trying to enforce the Initiated Ordinance was to spare abutting property owners from special assessments directed at their property. In this respect, at least, the Initiated Ordinance was and is little more than a law "for the mere advantage of particular individuals." *Blaisdell*, *supra*, 290 U.S. at 445. It simply cannot withstand harsh scrutiny under the Contract Clause.

CONCLUSION

For all of these reasons, it is apparent that the Petition herein presents no important or special federal question warranting further consideration by this Court. Respondent thus prays that the writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

United States Constitution, Article I, Section 10 (First Clause)

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Ohio Constitution, Article II, Section 28

Retroactive laws.

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

Ohio Constitution, Article IV, Section 4(B)

Common pleas court.

(B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

Ohio Revised Code (R.C.), Section 133.71

Definitions; procedure to obtain adjudication of validity of issuance of securities; defendants.

(A) As used in section 133.71 to 133.80 of the Revised Code:

(1) "Issuer" means the state, or any county, municipal corporation, township, board of education, taxing district, political district, subdivision, division, commission, author-

ity, department, board, officer, institution, body corporate and politic, or other public entity which is authorized by law to borrow money and issue securities.

(2) "Securities" means bonds, notes, or other evidences of indebtedness.

(B) An issuer, prior to the issuance of any particular issue of securities which it proposes to issue, may file a petition for validation and thereby commence an action for the purpose of obtaining an adjudication of its authority to issue the securities and the validity of the proceedings taken and proposed to be taken in connection therewith, including, but not limited to, any assessments of taxes levied or to be levied, and the lien of such taxes, the levy of rates, charges, or tolls, and proceedings or other remedies for the collection of such taxes, rates, charges, or tolls. No such action shall be commenced except upon determination of the necessity thereof by the authority empowered to adopt the resolution, ordinance, or order for the issuance of these securities. Such action may be brought in the court of common pleas of the county in which the issuer is located in whole or in part or has its principal place of business. The tax commissioner and the county auditor of the county in which the action is brought shall be named as party defendants. Service of summons shall, unless waived, be made upon such parties in the manner provided for service of summons in civil actions. The property owners, taxpayers, and citizens of the issuer, including nonresident owners of property subject to taxation or special assessment by the issuer and all other persons affected by or interested in the issuance of the securities, shall be joined as defendants to the same extent as if individually named in the petition. If the securities are to be issued by the state or by any commission, authority, department, board, institution, or other agency of the state, such action shall be brought in the court of common pleas of Franklin county. The tax commissioner and the auditor of Franklin county shall be named as party defendants, and the taxpayers, property owners, and citizens thereof, including nonresident owners of property subject to taxation or special assessment by the issuer and any other per-

sons affected by or interested in the issuance of the securities, shall be joined as defendants to the same extent as if individually named in petition.

Note: O.R.C. § 133.71 has been amended as of July 1, 1985. The foregoing reproduces the text of this section as it appeared at the time the initial bond validation proceedings were commenced by the City.

Ordinance of the City of Middletown, Ohio (proposed by initiative petition and adopted at the general election held on November 3, 1981):

BE IT ORDAINED BY THE PEOPLE OF MIDDLETOWN, OHIO:

Section I. That Resolution No. R81-03 and Ordinance Nos. 081-44 and 081-49 and, in addition, any and all further legislation not herein specifically designated by number but adopted by the City Commissioners of Middletown, Ohio and having reference to the widening and improvement of Manchester Road from Breiel Boulevard east to the Butler/Warren County line, be and hereby are, repealed.

Section II. That any and all commitments of the City of Middletown, Ohio to widen and improve Manchester Road from Breiel Boulevard east to the Butler/Warren County line be, and hereby are, repealed.

Section III. That this ordinance shall take effect and be in force from and after the earliest date allowed by law.